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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
**(HONORABLE BARRY T. MOSKOWITZ)**

UNITED STATES OF AMERICA, ) Criminal No. 07CR3276-BTM  
Plaintiff, ) Date: January 25, 2008  
v. ) Time: 1:30 p.m.  
MIGEUL MATEO ) STATEMENT OF FACTS AND MEMORANDUM  
Defendant. ) OF POINTS AND AUTHORITIES  
                                  ) IN SUPPORT OF DEFENDANT'S MOTIONS  
                                  )

## STATEMENT OF FACTS

The following statement of facts and facts further cited in this motion are based primarily on agents' reports received to date from the court. Mr. Mateo in no way admits the truth of these facts nor their accuracy as cited in these motions. Mr. Mateo reserves the right to challenge the truth and accuracy of these facts in any subsequent pleadings or during any further proceedings.

Mr. Mateo was found by United States Border Patrol Agent John G. Coyle, Jr. near San Ysidro, California on March 10, 2007. Upon his arrest he was taken to the Imperial Beach Border Patrol Station. He was later transported to San Diego Sheriff's Central Jail on March 15, 2007, where he was detained further. Immigration and Customs Enforcement agent Joseph Ferma initiated an interrogation of Mr. Mateo while he was still in custody in San Diego. On September 7, 2007, Mr. Mateo was taken to Immigration and Customs Enforcement where he was again interrogated.

On December 5, 2007, a January 2007 grand jury returned an indictment against Mr. Mateo.

1 Mr. Mateo is charged with being found in the United States in violation of 8 U.S.C. §§ 1326 (a) and (b). The  
 2 indictment alleges Mr. Mateo was removed from the United States subsequent to September 21, 2005.

3 **II.**

4 **THE INDICTMENT SHOULD BE DISMISSED BECAUSE JUDGE BURNS'S**  
**INSTRUCTIONS AS A WHOLE PROVIDED TO THE JANUARY 2007 GRAND JURY RUN**  
**AFOUL OF BOTH NAVARRO-VARGAS AND WILLIAMS AND VIOLATE THE FIFTH**  
**AMENDMENT BY DEPRIVING MR. MATEO OF THE TRADITIONAL FUNCTIONING OF**  
**THE GRAND JURY**

7 **A. Introduction.**

8 The indictment in the instant case was returned by the January 2007 grand jury. See CR at  
 9 7.<sup>1</sup> That grand jury was instructed by the Honorable Larry A. Burns, United States District Court Judge on  
 10 January 11, 2007. See Reporter's Partial Transcript of the Proceedings, dated January 11, 2007, a copy of  
 11 which is attached hereto as Exhibit A. Judge Burns's instructions to the impaneled grand jury deviate from  
 12 the instructions at issue in the major Ninth Circuit cases challenging a form grand jury instruction previously  
 13 given in this district in several ways.<sup>2</sup> These instructions compounded Judge Burns's erroneous instructions  
 14 and comments to prospective grand jurors during voir dire of the grand jury panel, which immediately  
 15 preceded the instructions at Ex. A. See Reporter's Transcript of Proceedings, dated January 11, 2007, a copy  
 16 of which is attached hereto as Exhibit B.<sup>3</sup>

17 **1. Judge Burns Instructed Grand Jurors That Their Singular Duty**  
**Is to Determine Whether or Not Probable Cause Exists and That**  
**They Have No Right to Decline to Indict When the Probable**  
**Cause Standard Is Satisfied.**

20 After repeatedly emphasizing to the grand jurors that probable cause determination was their

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23       <sup>1</sup> "CR" refers to the Clerk's Record in Case Number 07cr1905-H.

24       <sup>2</sup> See, e.g., United States v. Cortez-Rivera, 454 F.3d 1038 (9th Cir. 2006); United States v. Navarro-  
 25 Vargas, 408 F.3d 1184 (9th Cir.) (*en banc*), cert. denied, 126 S. Ct. 736 (2005) (Navarro-Vargas II); United  
States v. Navarro-Vargas, 367 F.3d 896 (9th Cir. 2004) (Navarro-Vargas I); United States v. Marcucci, 299  
 26 F.3d 1156 (9th Cir. 2002) (per curiam).

27       <sup>3</sup> The transcript of the voir dire indicates that grand jurors were shown a video presentation on the role  
 28 of the grand jury. Mr. Mateo requests that the video presentation be produced. See United States v. Alter,  
 482 F.2d 1016, 1029 n.21 (9th Cir. 1973) ("[t]he proceedings before the grand jury are secret, but the ground  
 rules by which the grand jury conducts those proceedings are not.").

1 sole responsibility, see Ex. A at 3, 3-4, 5.<sup>4</sup> Judge Burns instructed the grand jurors that they were forbidden  
 2 "from judg[ing] the wisdom of the criminal laws enacted by Congress; that is, whether or not there should  
 3 be a federal law or should not be a federal law designating certain activity [as] criminal is not up to you."  
 4 See id. at 8. The instructions go beyond that, however, and tell the grand jurors that, should "you disagree  
 5 with that judgment made by Congress, then your option is not to say 'well, I'm going to vote against indicting  
 6 even though I think that the evidence is sufficient' or 'I'm going to vote in favor of even though the evidence  
 7 may be insufficient.'" See id. at 8-9. Thus, the instruction flatly bars the grand jury from declining to indict  
 8 because the grand jurors disagree with a proposed prosecution.

9                 Immediately before limiting the grand jurors' powers in the way just described, Judge Burns  
 10 referred to an instance in the grand juror selection process in which he excused three potential jurors. See  
 11 id. at 8.

12                 I've gone over this with a couple of people. You understood from the  
 13 questions and answers that a couple of people were excused, I think three in  
 14 this case, because they could not adhere to the principle that I'm about to tell  
 15 you.

16 Id. That "principle" was Judge Burns's discussion of the grand jurors' inability to give effect to their  
 17 disagreement with Congress. See id. at 8-9. Thus, Judge Burns not only instructed the grand jurors on his  
 18 view of their discretion; he enforced that view on pain of being excused from service as a grand juror.

19                 Examination of the recently disclosed voir dire transcript, which contains additional  
 20 instructions and commentary in the form of the give and take between Judge Burns and various prospective  
 21 grand jurors, reveals how Judge Burns's emphasis of the singular duty is to determine whether or not  
 22 probable cause exists and his statement that grand jurors they cannot judge the wisdom of the criminal laws  
 23 enacted by Congress merely compounded an erroneous series of instructions already given to the grand jury  
 24 venire. In one of his earliest substantive remarks, Judge Burns makes clear that the grand jury's sole function  
 25 is probable cause determination.

26                 [T]he grand jury is determining really two factors: "do we have a reasonable  
 27 belief that a crime was committed? And second, do we have a reasonable  
 28 belief that the person that they propose that we indict committed the crime?"

If the answer is "yes" to both of those, then the case should move forward.

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<sup>4</sup> See also id. at 20 ("You're all about probable cause.").

If the answer to either of the questions is "no," then the grand jury should not hesitate and not indict.

See Ex. B at 8. In this passage, Judge Burns twice uses the term "should" in a context makes clear that the term is employed to convey instruction: "should" cannot reasonably be read to mean optional when it addresses the obligation not to indict when the grand jury has no "reasonable belief that a crime was committed" or if it has no "reasonable belief that the person that they propose that we indict committed the crime."

Equally revealing are Judge Burns's interactions with two potential grand jurors who indicated that, in some unknown set of circumstances, they might decline to indict even where there was probable cause. Because of the redactions of the grand jurors' names, Mr. Mateo will refer to them by occupation. One is a retired clinical social worker (hereinafter CSW), and the other is a real estate agent (hereinafter REA). The CSW indicated a view that no drugs should be considered illegal and that some drug prosecutions were not an effective use of resources. See id. at 16. The CSW was also troubled by certain unspecified immigration cases. See id.

Judge Burns made no effort to determine what sorts of drug and immigration cases troubled the CSW. He never inquired as to whether the CSW was at all troubled by the sorts of cases actually filed in this district, such as drug smuggling cases and cases involving reentry after deportation and alien smuggling. Rather, he provided instructions suggesting that, in any event, any scruples CSW may have possessed were simply not capable of expression in the context of grand jury service.

Now, the question is can you fairly evaluate [drug cases and immigration cases]? Just as the defendant is ultimately entitled to a fair trial and the person that's accused is entitled to a fair appraisal of the evidence of the case that's in front of you, so, too, is the United States entitled to a fair judgment. If there's probable cause, then the case should go forward. *I wouldn't want you to say, "well, yeah, there's probable cause, but I still don't like what our government is doing. I disagree with these laws, so I'm not going to vote for it to go forward."* If that is your frame of mind, the probably you shouldn't serve. Only you can tell me that.

See id. at 16-17 (emphasis added). Thus, without any sort of context whatsoever, Judge Burns let the grand juror know that he would not want him or her to decline to indict in an individual case where the grand juror "[didn't] like what our government is doing," see id. at 17, but in which there was probable cause. See Id.

Such a case "should go forward." See id. Given that blanket proscription on grand juror discretion, made manifest by Judge Burns's use of the pronoun "I", the CSW indicated that it "would be difficult to support a charge even if [the CSW] thought the evidence warranted it." See id. Again, Judge Burns's question provided no context; he inquired regarding "a case," a term presumably just as applicable to possession of a small amount of medical marijuana as kilogram quantities of methamphetamine for distribution. Any grand juror listening to this exchange could only conclude that there was *no* case in which Judge Burns would permit them to vote "no bill" in the face of a showing probable cause.

Just in case there may have been a grand juror that did not understand his or her inability to exercise anything like prosecutorial discretion, Judge Burns drove the point home in his exchange with REA. REA first advised Judge Burns of a concern regarding the "disparity between state and federal law" regarding "medical marijuana." See id. at 24. Judge Burns first sought to address REA's concerns about medical marijuana by stating that grand jurors, like trial jurors, are simply forbidden from taking penalty considerations into account.

Well, those things -- the consequences of your determination shouldn't concern you in the sense that penalties or punishment, things like that -- we tell trial jurors, of course, that they cannot consider the punishment or the consequence that Congress has set for these things. We'd ask you to also abide by that. We want you to make a business-like decision of whether there was a probable cause. . . .

Id. at 24-25. Having stated that REA was to "abide" by the instruction given to trial jurors, Judge Burns went on to suggest that REA recuse him or herself from medical marijuana cases. See id. at 25.

In response to further questioning, REA disclosed REA's belief "that drugs should be legal." See id. That disclosure prompted Judge Burns to begin a discussion that ultimately led to an instruction that a grand juror is obligated to vote to indict if there is probable cause.

I can tell you sometimes I don't agree with some of the legal decisions that are indicated that I have to make. But my alternative is to vote for someone different, vote for someone that supports the policies I support and get the law changed. It's not for me to say, "well, I don't like it. So I'm not going to follow it here."

You'd have a similar obligation as a grand juror even though you might have to grit your teeth on some cases. Philosophically, if you were a member of congress, you'd vote against, for example, criminalizing marijuana. I don't know if that's it, but you'd vote against criminalizing some drugs.

That's not what your prerogative is here. You're prerogative instead is to act

1 like a judge and say, "all right. This is what I've to deal with objectively.  
 2 Does it seem to me that a crime was committed? Yes. Does it seem to me  
 3 that this person's involved? It does." *And then your obligation, if you find  
 those to be true, would be to vote in favor of the case going forward.*

4 Id. at 26-27 (emphasis added). Thus, the grand juror's duty is to conduct a simple two part test, which, if  
 5 both questions are answered in the affirmative, lead to an "obligation" to indict.

6 Having set forth the duty to indict, and being advised that REA was "uncomfortable" with  
 7 that paradigm, Judge Burns then set about to ensure that there was no chance of a deviation from the  
 8 obligation to indict in every case in which there was probable cause.

9 The Court: Do you think you'd be inclined to let people go in drug cases even  
 10 though you were convinced there was probable cause they committed a drug  
 11 offense?

12 REA: It would depend on the case.

13 The Court: Is there a chance that you would do that?

14 REA: Yes.

15 The Court: I appreciate your answers. I'll excuse you at this time.

16 Id. at 27. Two aspects of this exchange are crucial. First, REA plainly does not intend to act solely on his  
 17 political belief in decriminalization – whether he or she would indict "depend[s] on the case," see id., as it  
 18 should. Because REA's vote "depend[s] on the case," see id., it is necessarily true that REA would vote to  
 19 indict in some (perhaps many or even nearly all) cases in which there was probable cause. Again, Judge  
 20 Burns made no effort to explore REA's views; he did not ascertain what sorts of cases would prompt REA  
 21 to hesitate. The message is clear: it does not matter what type of case might prompt REA's reluctance to  
 22 indict because, once the two part test is satisfied, the "obligation" is "to vote in favor of the case going  
 23 forward."<sup>5</sup> See id. at 27. That is why even the "chance," see id., that a grand juror might not vote to indict  
 24 was too great a risk to run.

25 **2. The Instructions Posit a Non-Existent Prosecutorial Duty to Offer  
 Exculpatory Evidence.**

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26 <sup>5</sup> This point is underscored by Judge Burns's explanation to the Grand Jury that a magistrate judge  
 27 will have determined the existence of probable cause "in most circumstances" before it has been presented  
 28 with any evidence. See Ex. A at 6. This instruction created an imprimatur of finding probable cause in each  
 case because had a magistrate judge not so found, the case likely would not have been presented to the Grand  
 Jury for indictment at all. The Grand Jury was informed that it merely was redundant to the magistrate court  
 "in most circumstances." See id. This instruction made the grand jury more inclined to indict irrespective  
 of the evidence presented.

1           In addition to his instructions on the authority to choose not to indict, Judge Burns also  
 2 assured the grand jurors that prosecutors would present to them evidence that tended to undercut probable  
 3 cause. See Ex. A at 20.<sup>6</sup>

4           Now, again, this emphasizes the difference between the function of the grand  
 5 jury and the trial jury. You're all about probable cause. If you think that  
 6 there's evidence out there that might cause you to say "well, I don't think  
 7 probable cause exists," then it's incumbent upon you to hear that evidence as  
*U.S. Attorneys are duty-bound to present evidence that cuts against what they may be asking you to do if they're aware of that evidence.*

8 Id. (emphasis added).

9           The antecedent to this instruction is also found in the voir dire. After advising the grand  
 10 jurors that "the presentation of evidence to the grand jury is necessarily one-sided," see Ex. B at 14, Judge  
 11 Burns gratuitously added that "[his] experience is that the prosecutors don't play hide-the-ball. If there's  
 12 something adverse or that cuts against the charge, you'll be informed of that. They have a duty to do that."  
 13 See id. Thus, Judge Burns unequivocally advised the grand jurors that the government would present any  
 14 evidence that was "adverse" or "that cuts against the charge." See id.

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16           <sup>6</sup> These instructions were provided in the midst of several comments that praised the United States  
 17 attorney's office and prosecutors in general. Judge Burns advised the grand jurors that they "can expect that  
 18 the U.S. Attorneys that will appear in front of [them] will be candid, they'll be honest, and . . . they'll act in  
 19 good faith in all matters presented to you." See Ex. A at 27. The instructions delivered during voir dire go  
 20 even further. In addressing a prospective grand juror who revealed "a strong bias for the U.S. Attorney,  
 21 whatever cases they might bring," see Ex. B at 38, Judge Burns affirmatively endorsed the prospective juror's  
 22 view of the U.S. Attorney's office, even while purporting to discourage it: "frankly, I agree with the things you  
 23 are saying. They make sense to me." See id. at 43. See also id. at 40 ("You were saying that you give a  
 24 presumption of good faith to the U.S. Attorney and assume, quite logically, that they're not about the business  
 of trying to indict innocent people or people that they believe to be innocent or the evidence doesn't  
 substantiate the charges against.").

Judge Burns's discussion of his once having been a prosecutor before the Grand Jury compounded the  
 error inherent in his praising of the government attorneys. See Ex. A at 9-10. Judge Burns's instructions  
 implied that as a prior prosecutor and current "jury liaison judge," see id. at 8, he would not allow the  
 government attorneys to act inappropriately or to present cases for indictment where no probable cause  
 existed.

In addition, while Judge Burns instructed the Grand Jury that it had the power to question witnesses,  
 Judge Burns's instructions also told the Grand Jury that it should "be deferential to the U.S. Attorney if there  
 is an instance where the U.S. Attorney thinks a question ought not to be asked." See Ex. A at 12. As the  
 dissent in Navarro-Vargas pointed out, "the grand jury's independence is diluted by [such an] instruction,  
 which encourages deference to prosecutors." Navarro-Vargas, 408 F.3d at 1215. The judge's admonition that  
 his statement was only "advice," see Ex. A at 12, does not cure the error as courts regularly presume grand  
 jurors follow instructions provided to them by the court. See id. at 1202, n.23 ("We must presume that grand  
 jurors will follow instructions because, in fact, we are prohibited from examining jurors to verify whether they  
 understood the instruction as given and then followed it.").

1      **B. Navarro-Vargas Establishes Limits on the Ability of Judges to Constrain**  
 2      **the Powers of the Grand Jury, Which Judge Burns Far Exceeded in His**  
 3      **Instructions as a Whole During Impanelment.**

4            The Ninth Circuit has, over vigorous dissents, rejected challenges to various instructions  
 5       given to grand jurors in the Southern District of California. See Navarro-Vargas II, 408 F.3d 1184. While  
 6       the Ninth Circuit has thus far (narrowly) rejected such challenges, it has, in the course of adopting a highly  
 7       formalistic approach<sup>7</sup> to the problems posed by the instructions, endorsed many of the substantive arguments  
 8       raised by the defendants in those cases. The district court's instructions cannot be reconciled with the role  
 9       of the grand jury as set forth in Navarro-Vargas II. Taken together, the voir dire of and instructions given  
 10      to the January 2007 Grand Jury, go far beyond those at issue in Navarro-Vargas, taking a giant leap in the  
 11      direction of a bureaucratic, deferential grand jury, focused solely upon probable cause determinations and  
 12      utterly unable to exercise any quasi-prosecutorial discretion. That is not the institution the Framers  
 13      envisioned. See United States v. Williams, 504 U.S. 36, 49 (1992).

14            For instance, with respect to the grand jury's relationship with the prosecution, the Navarro-  
 15      Vargas II majority acknowledges that the two institutions perform similar functions: "'the public prosecutor,  
 16      in deciding whether a particular prosecution shall be instituted or followed up, performs much the same  
 17      function as a grand jury.'" Navarro-Vargas II, 408 F.3d at 1200 (quoting Butz v. Economou, 438 U.S. 478,  
 18      510 (1978)). Accord United States v. Navarro-Vargas, 367 F.3d 896, 900 (9th Cir. 2004) (Navarro-Vargas  
 19      I)(Kozinski, J., dissenting) (The grand jury's discretion in this regard "is most accurately described as  
 20      prosecutorial." ). See also Navarro-Vargas II, 408 F.3d at 1213 (Hawkins, J., dissenting). It recognizes that  
 21      the prosecutor is not obligated to proceed on any indictment or presentment returned by a grand jury, id.,  
 22      but also that "the grand jury has no obligation to prepare a presentment or to return an indictment drafted  
 23      by the prosecutor." Id. See Niki Kuckes, The Democratic Prosecutor: Explaining the Constitutional  
 24      Function of the Federal Grand Jury, 94 Geo. L.J. 1265, 1302 (2006) (the grand jury's discretion not to indict  
 25      was "arguably . . . the most important attribute of grand jury review from the perspective of those who  
 26      insisted that a grand jury clause be included in the Bill of Rights") (quoting Wayne LaFave et al., Criminal

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27      <sup>7</sup> See Navarro-Vargas II, 408 F.3d at 1210-11 (Hawkins, J., dissenting) (criticizing the majority  
 28      because "[t]he instruction's use of the word 'should' is most likely to be understood as imposing an inflexible  
             duty or obligation' on grand jurors, and thus to circumscribe the grand jury's constitutional independence.").

1 Procedure § 15.2(g) (2d ed. 1999)).

2       Indeed, the Navarro-Vargas II majority agrees that the grand jury possesses all the attributes  
 3 set forth in Vasquez v. Hillery, 474 U.S. 254 (1986). See id.

4       The grand jury thus determines not only whether probable cause exists, but  
 5 also whether to "charge a greater offense or a lesser offense; numerous counts  
 6 or a single count; and perhaps most significant of all, a capital offense or a  
 7 non-capital offense – all on the basis of the same facts. And, significantly,  
 8 the grand jury may refuse to return an indictment even "'where a conviction  
 9 can be obtained.'"

10      *Id.* (quoting Vasquez, 474 U.S. at 263). The Supreme Court has itself reaffirmed Vasquez's description of  
 11 the grand jury's attributes in Campbell v. Louisiana, 523 U.S. 392 (1998), noting that the grand jury "controls  
 12 not only the initial decision to indict, but also significant questions such as how many counts to charge and  
 13 whether to charge a greater or lesser offense, including the important decision whether to charge a capital  
 14 crime." *Id.* at 399 (citing Vasquez, 474 U.S. at 263). Judge Hawkins notes that the Navarro-Vargas II  
 15 majority accepts the major premise of Vasquez: "the majority agrees that a grand jury has the power to refuse  
 16 to indict someone even when the prosecutor has established probable cause that this individual has  
 17 committed a crime." See id. at 1214 (Hawkins, J. dissenting). Accord Navarro-Vargas I, 367 F.3d at 899  
 18 (Kozinski, J., dissenting); United States v. Marcucci, 299 F.3d 1156, 1166-73 (9th Cir. 2002) (per curiam)  
 19 (Hawkins, J., dissenting). In short, the grand jurors' prerogative not to indict enjoys strong support in the  
 20 Ninth Circuit. But not in Judge Burns's instructions.

21      **C.           Judge Burns's Instructions Forbid the Exercise of Grand Jury  
 22 Discretion Established in Both *Vasquez* and *Navarro-Vargas II*.**

23      The Navarro-Vargas II majority found that the instruction in that case "leave[s] room for the  
 24 grand jury to dismiss even if it finds probable cause," 408 F.3d at 1205, adopting the analysis in its previous  
 25 decision in Marcucci. Marcucci reasoned that the instructions do not mandate that grand jurors indict upon  
 26 every finding of probable cause because the term "should" may mean "what is probable or expected." 299  
 27 F.3d at 1164 (citation omitted). That reading of the term "should" makes no sense in context, as Judge  
 28 Hawkins ably pointed out. See Navarro-Vargas II, 408 F.3d at 1210-11 (Hawkins, J., dissenting) ("The  
 29 instruction's use of the word 'should' is most likely to be understood as imposing an inflexible 'duty or  
 30 obligation' on grand jurors, and thus to circumscribe the grand jury's constitutional independence."). See

1 also id. ("The 'word' should is used to express a duty [or] obligation.") (quoting The Oxford American  
 2 Diction and Language Guide 1579 (1999) (brackets in original)).

3 The debate about what the word "should" means is irrelevant here; the instructions here make  
 4 no such fine distinction. The grand jury instructions make it painfully clear that grand jurors simply may  
 5 not choose not to indict in the event of what appears to them to be an unfair application of the law: should  
 6 "you disagree with that judgment made by Congress, then your option is not to say 'well, I'm going to vote  
 7 against indicting even though I think that the evidence is sufficient'...." See Ex. A at 8-9. Thus, the  
 8 instruction flatly bars the grand jury from declining to indict because they disagree with a proposed  
 9 prosecution. No grand juror would read this language as instructing, or even allowing, him or her to assess  
 10 "the need to indict." Vasquez, 474 U.S. at 264.

11 While Judge Burns used the word "should" instead of "shall" during voir dire with respect  
 12 to whether an indictment was required if probable cause existed, see Ex. B at 4, 8, n context, it is clear that  
 13 he could only mean "should" in the obligatory sense. For example, when addressing a prospective juror,  
 14 Judge Burns not only told the jurors that they "should" indict if there is probable cause, he told them that  
 15 if there is not probable cause, "then the grand jury should hesitate and not indict." See id. at 8. At least in  
 16 context, it would strain credulity to suggest that Judge Burns was using "should" for the purpose of "leaving  
 17 room for the grand jury to [indict] even if it finds [no] probable cause." See Navarro-Vargas, 408 F.3d at  
 18 1205. Clearly he was not.

19 The full passage cited above effectively eliminates any possibility that Judge Burns intended  
 20 the Navarro-Vargas spin on the word "should."

21 [T]he grand jury is determining really two factors: "do we have a reasonable  
 22 belief that a crime was committed? And second, do we have a reasonable  
 23 belief that the person that they propose that we indict committed the crime?"

24 If the answer is "yes" to both of those, then the case should move forward.  
 25 If the answer to either of the questions is "no," then the grand jury should not  
 26 hesitate and not indict.

27 See Ex. B at 8. Of the two sentences containing the word "should," the latter of the two essentially states  
 28 that if there is no probable cause, you *should* not indict. Judge Burns could not possibly have intended to  
 "leav[e] room for the grand jury to [indict] even if it finds [no] probable cause." See Navarro-Vargas, 408

1 F.3d at 1205 (citing Marcucci, 299 F.3d at 1159). That would contravene the grand jury's historic role of  
 2 protecting the innocent. See, e.g., United States v. Calandra, 414 U.S. 338, 343 (1974) (The grand jury's  
 3 "responsibilities continue to include both the determination whether there is probable cause and the  
 4 protection of citizens against unfounded criminal prosecutions.") (citation omitted).

5 By the same token, if Judge Burns said that "the case should move forward" if there is  
 6 probable cause, but intended to "leav[e] room for the grand jury to dismiss even if it finds probable cause,"  
 7 see Navarro-Vargas, 408 F.3d at 1205 (citing Marcucci, 299 F.3d at 1159), then he would have to have  
 8 intended two different meanings of the word "should" in the space of two consecutive sentences. That could  
 9 not have been his intent. But even if it were, no grand jury could ever have had that understanding.<sup>8</sup> Jurors  
 10 are not presumed to be capable of sorting through internally contradictory instructions. See generally United  
 11 States v. Lewis, 67 F.3d 225, 234 (9th Cir. 1995) ("where two instructions conflict, a reviewing court cannot  
 12 presume that the jury followed the correct one") (citation, internal quotations and brackets omitted).

13 Lest there be any room for ambiguity, on no less than four occasions, Judge Burns made it  
 14 explicitly clear to the grand jurors that "should" was not merely suggestive, but obligatory:

15 (1) The first occasion occurred in the following exchange when Judge Burns conducted  
 16 voir dire and excused a potential juror (CSW):

17 The Court: . . . If there's probable cause, then the case should go forward. I  
 18 wouldn't want you to say, "Well, yeah, there's probable cause. But I still don't  
 19 like what the government is doing. I disagree with these laws, so I'm not  
 20 going to vote for it to go forward." If that's your frame of mind, then  
 21 probably you shouldn't serve. Only you can tell me that.

Prospective Juror: Well, I think I may fall in that category.

The Court: In the latter category?

Prospective Juror: Yes.

The Court: Where it would be difficult for you to support a charge even if  
 21 you thought the evidence warranted it?

Prospective Juror: Yes.

The Court: I'm going to excuse you then.

23 See Ex. B at 17. There was nothing ambiguous about the word "should" in this exchange with a prospective  
 24 juror. Even if the prospective juror did not like what the government was doing in a particular case, that case  
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27 <sup>8</sup> This argument does not turn on Mr. Mateo's view that the Navarro-Vargas/Marcucci reading of the  
 28 word "should" in the model instructions is wildly implausible. Rather, it turns on the context in which the  
 word is employed by Judge Burns in his unique instructions, context which eliminates the Navarro-  
Vargas/Marcucci reading as a possibility.

1 "should go forward" and Judge Burns expressly disapproved of any vote that might prevent that. See id. ("I  
 2 wouldn't want you [to vote against such a case]"). The sanction for the possibility of independent judgment  
 3 was dismissal, a result that provided full deterrence of that juror's discretion and secondary deterrence as to  
 4 the exercise of discretion by any other prospective grand juror.

5 (2) In an even more explicit example of what "should" meant, Judge Burns makes clear  
 6 that it there is an unbending obligation to indict if there is probable cause. Grand jurors have no other  
 7 prerogative.

8 Court . . . It's not for me to say, "Well, I don't like it. So I'm not going to follow it here."

9 You'd have a similar *obligation* as a grand juror even though you might have  
 10 to grit your teeth on some cases. Philosophically, if you were a member of  
 Congress, you'd vote against, for example, criminalizing marijuana. I don't  
 know if that's it, but you'd vote against criminalizing some drugs.

11 That's not what your *prerogative* is here. Your prerogative instead is act like  
 12 a judge and to say, "All right. This is what I've got to deal with objectively.  
 Does it seem to me that a crime was committed? Yes. Does it seem to me  
 13 that this person's involved? It does." *And then your obligation, if you find  
 those things to be true, would be to vote in favor of the case going forward.*

15 Id. at 26-27 (emphasis added). After telling this potential juror (REA) what his obligations and prerogatives  
 16 were, the Court inquired as to whether "you'd be inclined to let people go on drug cases even though you  
 17 were convinced there was probable cause they committed a drug offense?" Id. at 27. The potential juror  
 18 responded: "It would depend on the case." Id. Nevertheless, that juror was excused. Id. at 28. Again, in this  
 19 context, and contrary to the situation in Navarro-Vargas, "should" means "shall"; it is obligatory, and the  
 20 juror has no prerogative to do anything other than indict if there is probable cause.

21 Moreover, as this example demonstrates, the issue is not limited to whether the grand jury  
 22 believes a particular law to be "unwise." This juror said that any decision to indict would not depend on the  
 23 law, but rather it would "depend on the case." Thus, it is clear that Judge Burns's point was that if a juror  
 24 could not indict on probable cause for *every* case, then that juror was not fit for service. It is equally clear  
 25 that the prospective juror did not dispute the "wisdom of the law;" he was prepared to indict under some  
 26 factual scenarios, perhaps many. But Judge Burns did not pursue the question of what factual scenarios  
 27 troubled the prospective jurors, because his message is that there is no discretion not to indict.

28 //

1                             (3) As if the preceding examples were not enough, Judge Burns continued to pound the  
 2 point home that "should" meant "shall" when he told another grand juror during voir dire: "[W]hat I have  
 3 to insist on is that you follow the law that's given to us by the United States Congress. We enforce the  
 4 federal laws here." See id. at 61.

5                             (4) And then again, after swearing in all the grand jurors who had already agreed to indict  
 6 in every case where there was probable cause, Judge Burns reiterated that "should" means "shall" when he  
 7 reminded them that "your option is not to say 'well, I'm going to vote against indicting even though I think  
 8 that the evidence is sufficient . . . Instead your *obligation* is . . . not to bring your personal definition of  
 9 what the law ought to be and try to impose that through applying it in a grand jury setting." See Ex. A at 9.

10                          Moreover, Judge Burns advised the grand jurors that they were forbidden from considering  
 11 the penalties to which indicted persons may be subject.

12                          Prospective Juror (REA): ... And as far as being fair, it kind of depends on  
 13 what the case is about because there is a disparity between state and federal  
 14 law.

15                          The Court: In what regard?

16                          Prospective Juror: Specifically, medical marijuana.

17                          The Court: Well, those things – the consequences of your determination  
 18 shouldn't concern you in the sense that penalties or punishment, things like  
 19 that – *we tell trial jurors, of course, that they cannot consider the punishment*  
*or the consequence that Congress has set for these things. We'd ask you to*  
*also abide by that.* We want you to make a business-like decision of whether  
 20 there was a probable cause. ....

21                          See Ex. B at 24-25 (emphasis added). A "business-like decision of whether there was a probable cause"  
 22 would obviously leave no role for the consideration of penalty information.

23                          The Ninth Circuit previously rejected a claim based upon the proscription against  
 24 consideration of penalty information based upon the same unlikely reading of the word "should" employed  
 25 in Marcucci. See United States v. Cortez-Rivera, 454 F.3d 1038, 1040-41 (9th Cir. 2006). Cortez-Rivera  
 26 is inapposite for two reasons. First, Judge Burns did not use the term "should" in the passage quoted above.  
 27 Second, that context, as well as his consistent use of a mandatory meaning in employing the term, eliminate  
 28 the ambiguity (if there ever was any) relied upon by Cortez-Rivera. The instructions again violate Vasquez,  
 which plainly authorized consideration of penalty information. See 474 U.S. at 263.

29                          Noting can mask the undeniable fact that Judge Burns explicitly instructed the jurors time  
 30 and time again that they had a duty, an obligation, and a singular prerogative to indict each and every case

1 where there was probable cause. These instructions go far beyond the holding of Navarro-Vargas and stand  
 2 in direct contradiction of the Supreme Court's decision in Vasquez. Indeed, it defies credulity to suggest that  
 3 a grand juror hearing these instructions, and that voir dire, could possibly believe what the Supreme Court  
 4 held in Vasquez:

5 The grand jury does not determine only that probable cause exists to believe  
 6 that a defendant committed a crime, or that it does not. In the hands of the  
 7 grand jury lies the power to charge a greater offense or a lesser offense;  
 8 numerous counts or a single count; and perhaps most significant of all, a  
 capital offense or a non-capital offense – all on the basis of the same facts.  
 Moreover, “[t]he grand jury is not bound to indict in every case where a  
 conviction can be obtained.”

9 474 U.S. at 263 (quoting United States v. Ciambrone, 601 F.2d 616, 629 (2nd Cir. 1979) (Friendly, J.,  
 10 dissenting)); accord Campbell v. Louisiana, 523 U.S. 392, 399 (1998) (The grand jury “controls not only  
 11 the initial decision to indict, but also significant decisions such as how many counts to charge and whether  
 12 to charge a greater or lesser offense, including the important decision whether to charge a capital crime.”).  
 13 Nor would the January 2007 grand jury ever believe that it was empowered to assess the “the need to indict.”  
 14 See id. at 264. Judge Burns's grand jury is not Vasquez's grand jury. The instructions therefore represent  
 15 structural constitutional error "that interferes with the grand jury's independence and the integrity of the  
 16 grand jury proceeding." See United States v. Isgro, 974 F.2d 1091, 1094 (9th Cir. 1992). The indictment  
 17 must therefore be dismissed. Id.

18 The Navarro-Vargas II majority's faith in the structure of the grand jury *is not* a cure for the  
 19 instructions excesses. The Navarro-Vargas II majority attributes "[t]he grand jury's discretion -- its  
 20 independence -- [to] the absolute secrecy of its deliberations and vote and the unreviewability of its  
 21 decisions." 408 F.3d at 1200. As a result, the majority discounts the effect that a judge's instructions may  
 22 have on a grand jury because "it is the *structure* of the grand jury process and its *function* that make it  
 23 independent." Id. at 1202 (emphases in the original).

24 Judge Hawkins sharply criticized this approach. The majority, he explains, "believes that the  
 25 'structure' and 'function' of the grand jury -- particularly the secrecy of the proceedings and unreviewability  
 26 of many of its decisions -- sufficiently protects that power." See id. at 1214 (Hawkins, J., dissenting). The  
 27 flaw in the majority's analysis is that "[i]nstructing a grand jury that it lacks power to do anything beyond  
 28

1 making a probable cause determination ... unconstitutionally undermines the very structural protections that  
 2 the majority believes save[] the instruction." Id. After all, it is an "almost invariable assumption of the law  
 3 that jurors follow their instructions." Id. (quoting Richardson v. Marsh, 481 U.S. 200, 206 (1987)). If that  
 4 "invariable assumption" were to hold true, then the grand jurors could not possibly fulfill the role described  
 5 in Vasquez. Indeed, "there is something supremely cynical about saying that it is fine to give jurors  
 6 erroneous instructions because nothing will happen if they disobey them." Id.

7 In setting forth Judge Hawkins' views, Mr. Mateo understands that this Court may not adopt  
 8 them solely because the reasoning that supports them is so much more persuasive than the majority's  
 9 sophistry. Rather, he sets them forth to urge the Court *not to extend* what is already untenable reasoning.

10 Here, again, the question is not an obscure interpretation of the word "should", especially in  
 11 light of the instructions and commentary by Judge Burns during voir dire discussed above - unaccounted for  
 12 by the Court in Navarro-Vargas II because they had not yet been disclosed to the defense, but an absolute  
 13 ban on the right to refuse to indict that directly conflicts with the recognition of that right in Vasquez,  
 14 Campbell, and both Navarro-Vargas II opinions. Navarro-Vargas II is distinguishable on that basis, but not  
 15 only that.

16 Judge Burns did not limit himself to denying the grand jurors the power that Vasquez plainly  
 17 states they enjoy. He also excused prospective grand jurors who might have exercised that Fifth Amendment  
 18 prerogative, excusing "three [jurors] in this case, because they could not adhere to [that] principle...." See  
 19 Ex. A at 8; Ex. B at 17, 28. The structure of the grand jury and the secrecy of its deliberations cannot  
 20 embolden grand jurors who are no longer there, likely because they expressed their willingness to act as the  
 21 conscience of the community. See Navarro-Vargas II, 408 F.3d at 1210-11 (Hawkins, J., dissenting) (a  
 22 grand jury exercising its powers under Vasquez "serves ... to protect the accused from the other branches  
 23 of government by acting as the 'conscience of the community.'") (quoting Gaither v. United States, 413 F.2d  
 24 1061, 1066 & n.6 (D.C. Cir. 1969)). The federal courts possess only "very limited" power "to fashion, on  
 25 their own initiative, rules of grand jury procedure," United States v. Williams, 504 U.S. 36, 50 (1992), and,  
 26 here, Judge Burns has both fashioned his own rules and enforced them.

27 //

28 **D. The Instructions Conflict with Williams' Holding That There Is No Duty**

1                   **to Present Exculpatory Evidence to the Grand Jury.**

2                   In Williams, the defendant, although conceding that it was not required by the Fifth  
 3 Amendment, argued that the federal courts should exercise their supervisory power to order prosecutors to  
 4 disclose exculpatory evidence to grand jurors, or, perhaps, to find such disclosure required by Fifth  
 5 Amendment common law. See 504 U.S. at 45, 51. Williams held that "as a general matter at least, no such  
 6 'supervisory' judicial authority exists." See id. at 47. Indeed, although the supervisory power may provide  
 7 the authority "to dismiss an indictment because of misconduct before the grand jury, at least where that  
 8 misconduct amounts to a violation of one of those 'few, clear rules which were carefully drafted and  
 9 approved by this Court and by Congress to ensure the integrity of the grand jury's functions,'" id. at 46  
 10 (citation omitted), it does not serve as "a means of *prescribing* such standards of prosecutorial conduct in  
 11 the first instance." Id. at 47 (emphasis added). The federal courts possess only "very limited" power "to  
 12 fashion, on their own initiative, rules of grand jury procedure." Id. at 50. As a consequence, Williams  
 13 rejected the defendant's claim, both as an exercise of supervisory power and as Fifth Amendment common  
 14 law. See id. at 51-55.

15                  Despite the holding in Williams, the instructions here assure the grand jurors that prosecutors  
 16 would present to them evidence that tended to undercut probable cause. See Ex. A at 20.

17                  Now, again, this emphasizes the difference between the function of the grand  
 18 jury and the trial jury. You're all about probable cause. If you think that  
 19 there's evidence out there that might cause you say "well, I don't think  
 20 probable cause exists," then it's incumbent upon you to hear that evidence as  
 21 well. As I told you, in most instances, *the U.S. Attorneys are duty-bound to  
 22 present evidence that cuts against what they may be asking you to do if  
 23 they're aware of that evidence.*

24                  Id. (emphasis added). Moreover, the district court later returned to the notion of the prosecutors and their  
 25 duties, advising the grand jurors that they "can expect that the U.S. Attorneys that will appear in front of  
 26 [them] will be candid, they'll be honest, and ... they'll act in good faith in all matters presented to you." See  
 27 id. at 27. The Ninth Circuit has already concluded it is likely this final comment is "unnecessary." See  
 28 Navarro-Vargas, 408 F.3d at 1207.

29                  This particular instruction has a devastating effect on the grand jury's protective powers,  
 30 particularly if it is not true. It begins by emphasizing the message that Navarro-Vargas II somehow

concluded was not conveyed by the previous instruction: "You're all about probable cause." See Ex. A at 20. Thus, once again, the grand jury is reminded that they are limited to probable cause determinations (a reminder that was probably unnecessary in light of the fact that Judge Burns had already told the grand jurors that they likely would be excused if they rejected this limitation). The instruction goes on to tell the grand jurors that they should consider evidence that undercuts probable cause, but also advises the grand jurors that the prosecutor will present it. The end result, then, is that grand jurors should consider evidence that goes against probable cause, but, if none is presented by the government, they can presume that there is none. After all, "in most instances, the U.S. Attorneys are duty-bound to present evidence that cuts against what they may be asking you to do if they're aware of that evidence." See id. Moreover, during voir dire, Judge Burns informed the jurors that "my experience is that the prosecutors don't play hide-the-ball. If there's something adverse or that cuts against the charge, you'll be informed of that. *They have a duty to do that.*" See Ex. B at 14-15 (emphasis added). Thus, if the exculpatory evidence existed, it necessarily would have been presented by the "duty-bound" prosecutor, because the grand jurors "can expect that the U.S. Attorneys that will appear in front of [them] will be candid, they'll be honest, and ... they'll act in good faith in all matters presented to you." See Ex. A at 27.

These instructions create a presumption that, in cases where the prosecutor does not present exculpatory evidence, no exculpatory evidence exists. A grand juror's reasoning, in a case in which no exculpatory evidence was presented, would proceed along these lines:

(1) I have to consider evidence that undercuts probable cause.

(2) The candid, honest, duty-bound prosecutor would, in good faith, have presented any such evidence to me, if it existed.

(3) Because no such evidence was presented to me, I may conclude that there is none.

Even if some exculpatory evidence were presented, a grand juror would necessarily presume that the evidence presented represents the universe of all available exculpatory evidence; if there was more, the duty-bound prosecutor would have presented it.

The instructions, therefore, discourage investigation—if exculpatory evidence were out there, the prosecutor would present it, so investigation is a waste of time—and provide additional support to every probable cause determination: i.e., this case may be weak, but I know that there is nothing on the other side

of the equation because it was not presented. A grand jury so badly misguided is no grand jury at all under the Fifth Amendment.

III.

**MOTION TO COMPEL DISCOVERY/PRESERVE EVIDENCE**

Counsel for Mr. Mateo **specifically requests a viewing of Mr. Mateo's A-file, a copy of tapes from the alleged deportation hearing, and any signed waiver of Miranda rights prior to September 7, 2007 or videotape of Miranda advisal.** Mr. Mateo moves for the production of this and the following discovery. This request is not limited to those items that the prosecutor knows of, but rather includes all discovery listed below that is in the custody, control, care, or knowledge of any "closely related investigative [or other] agencies." See United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989).

(1) Arrest Reports and Notes. The defendant also specifically requests that the government turn over all arrest reports, notes and TECS records not already produced that relate to the circumstances surrounding his arrest or any questioning. This request includes, but is not limited to, any rough notes, records, reports, transcripts, referral slips, or other documents in which statements of the defendant or any other discoverable material is contained. Such material is discoverable under Fed. R. Crim. P. 16(a)(1)(A) and Brady v. Maryland. The government must produce arrest reports, investigators' notes, memos from arresting officers, sworn statements, and prosecution reports pertaining to the defendant. *See* Fed. R. Crim. P. 16(a)(1)(B) and (E), 26.2 and 12(I); United States v. Harris, 543 F.2d 1247, 1253 (9<sup>th</sup> Cir. 1976) (original notes with suspect or witness must be preserved); see also United States v. Anderson, 813 F.2d 1450, 1458 (9<sup>th</sup> Cir. 1987) (reaffirming Harris' holding).

(2) Brady Material. The defendant requests all documents, statements, agents' reports, and tangible evidence favorable to the defendant on the issue of guilt and/or which affects the credibility of the government's case. Kyles v. Whitley, 514 U.S. 419 (1995). Under Brady, Kyles and their progeny, impeachment as well as exculpatory evidence falls within the definition of evidence favorable to the accused. See also United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S.

1 97 (1976). This includes information obtained from other investigations which exonerates Mr. Mateo.

2 (3) Any Information That May Result in a Lower Sentence Under The Guidelines. The  
3 government must also produce this information under Brady v. Maryland. This request includes any  
4 cooperation or attempted cooperation by the defendant as well as any information, including that  
5 obtained from other investigations or debriefings, that could affect any base offense level or specific  
6 offense characteristic under Chapter Two of the Guidelines. The defendant also requests any  
7 information relevant to a Chapter Three adjustment, a determination of the defendant's criminal history,  
8 and information relevant to any other application of the Guidelines.

9 (4) The Defendant's Prior Record. The defendant requests disclosure of his prior record.  
10 Fed. R. Crim. P. 16(a)(1)(D).

11 (5) Any Proposed 404(b) Evidence. The government must produce evidence of prior  
12 similar acts under Fed. R. Crim. P. 16(a)(1)(E) and Fed. R. Evid. 404(b) and 609. In addition, "upon  
13 request of the accused, the prosecution . . . shall provide reasonable notice in advance of trial . . . of the  
14 general nature" of any evidence the government proposes to introduce under Fed. R. Evid. 404(b) at trial  
15 and the purpose for which introduction is sought. This applies not only to evidence which the  
16 government may seek to introduce in its case-in-chief but also to evidence which the government may  
17 use as rebuttal. See United States v. Vega, 188 F.3d 1150 (9th Cir. 1999). The defendant is entitled to  
18 "reasonable notice" so as to "reduce surprise," preclude "trial by ambush" and prevent the "possibility of  
19 prejudice." Id.; United States v. Perez-Tosta, 36 F.3d 1552, 1560-61 (11th Cir. 1994). Mr. Mateo  
20 requests such reasonable notice at least two weeks before trial so as to adequately investigate and  
21 prepare for trial.

22 (6) Evidence Seized. The defendant requests production of evidence seized as a result  
23 of any search, either warrantless or with a warrant. Fed. R. Crim. P. 16(a)(1)(E).

24 (7) Request for Preservation of Evidence. The defendant specifically requests the  
25 preservation of any and all physical evidence that may be destroyed, lost, or otherwise put out of the  
26 possession, custody, or care of the government and which relates to the arrest or the events leading to the  
27 arrest in this case. This request includes, but is not limited to, the results of any fingerprint analysis, the  
28 defendant's personal effects, and any evidence seized from the defendant or any third party in relation to

1 this case.

2           In addition, Mr. Mateo requests that the Assistant United States Attorney assigned to this  
3 case oversee a review of all personnel files of each agent involved in the present case for impeachment  
4 material. Kyles, 514 U.S. at 419; United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991); United States  
5 v. Lacy, 896 F. Supp. 982 (N.D. Ca. 1995). At a minimum, the prosecutor has the obligation to inquire  
6 of his or his agents in order to ascertain whether or not evidence relevant to veracity or other  
7 impeachment exists.

8           (8) Tangible Objects. The defendant requests the opportunity to inspect and copy as well  
9 as test, if necessary, all other documents and tangible objects, including photographs, books, papers,  
10 documents, fingerprint analyses, vehicles, or copies of portions thereof, which are material to the defense  
11 or intended for use in the government's case-in-chief or were obtained from or belong to the defendant.  
12 Fed. R. Crim. P. 16(a)(1)(E). Specifically, to the extent they were not already produced, the defendant  
13 requests copies of all photographs of the defendant, and any other photos taken in connection with this  
14 case.

15           (9) Expert Witnesses. The defendant requests the name, qualifications, and a written  
16 summary of the testimony of any person that the government intends to call as an expert witness during  
17 its case in chief. Fed. R. Crim. P. 16(a)(1)(G). The defense requests that notice of expert testimony be  
18 provided at a minimum of two weeks prior to trial so that the defense can properly prepare to address  
19 and respond to this testimony, including obtaining its own expert and/or investigating the opinions and  
20 credentials of the government's expert. The defense also requests a hearing in advance of trial to  
21 determine the admissibility of qualifications of any expert. See Kumho v. Carmichael Tire Co. 119 S.  
22 Ct. 1167, 1176 (1999) (trial judge is "gatekeeper" and must determine reliability and relevancy of expert  
23 testimony and such determinations may require "special briefing or other proceedings . . .").

24           (10) Evidence of Bias or Motive to Lie. The defendant requests any evidence that any  
25 prospective government witness is biased or prejudiced against the defendant, or has a motive to falsify  
26 or distort his or her testimony.

27           (11) Impeachment Evidence. The defendant requests any evidence that any prospective  
28 government witness has engaged in any criminal act whether or not resulting in a conviction and whether

1 any witness has made a statement favorable to the defendant. See Fed. R. Evid. 608, 609 and 613; Brady  
2 v. Maryland.

3 (12) Evidence of Criminal Investigation of Any Government Witness. The defendant  
4 requests any evidence that any prospective witness is under investigation by federal, state or local  
5 authorities for any criminal conduct.

6 (13) Evidence Affecting Perception, Recollection, Ability to Communicate, or Truth  
7 Telling. The defense requests any evidence, including any medical or psychiatric report or evaluation,  
8 that tends to show that any prospective witness's ability to perceive, remember, communicate, or tell the  
9 truth is impaired, and any evidence that a witness has ever used narcotics or other controlled substance,  
10 or has ever been an alcoholic.

11 (14) Jencks Act Material. The defendant requests production in advance of trial of all  
12 material, including any tapes, which the government must produce pursuant to the Jencks Act, 18 U.S.C.  
13 § 3500; Fed. R. Crim. P. 26.2. Advance production will avoid the possibility of delay at the request of  
14 the defendant to investigate the Jencks material. A verbal acknowledgment that "rough" notes constitute  
15 an accurate account of the witness' interview is sufficient for the report or notes to qualify as a statement  
16 under section 3500(e)(1). Campbell v. United States, 373 U.S. 487, 490-92 (1963); see also United

17 States v. Boshell, 952 F.2d 1101 (9th Cir. 1991) (holding that where an agent goes over interview notes  
18 with subject interview notes are subject to Jencks Act).

19 (15) Giglio Information. Pursuant to Giglio v. United States, 405 U.S. 150 (1972), the  
20 defendant requests all statements and/or promises, express or implied, made to any government  
21 witnesses, in exchange for their testimony in this case, and all other information which could arguably be  
22 used for the impeachment of any government witnesses.

23 (16) Agreements Between the Government and Witnesses. In this case, the defendant  
24 requests identification of any cooperating witnesses who have committed crimes but were not charged so  
25 that they may testify for the government in this case. The defendant also requests discovery regarding  
26 any express or implicit promise; understanding; offer of immunity; past, present, or future compensation;  
27 or any other kind of agreement or understanding, including any implicit understanding relating to  
28 criminal or civil income tax, forfeiture or fine liability between any prospective government witness and

1 the government (federal, state and/or local). This request also includes any discussion with a potential  
2 witness about or advice concerning any contemplated prosecution, or any possible plea bargain, even if  
3 no bargain was made, or the advice not followed.

4 Pursuant to United States v. Sudikoff, 36 F. Supp.2d 1196 (C.D. Cal. 1999), the defense  
5 requests all statements made, either personally or through counsel, at any time which relate to the  
6 witnesses' statements regarding this case, any promises -- implied or express -- regarding  
7 punishment/prosecution or detention of these witnesses, any agreement sought, bargained for or  
8 requested, on the part of the witness at any time.

9 (17) Informants and Cooperating Witnesses. To the extent that there was any informant  
10 the defendant requests disclosure of the names and addresses of all informants or cooperating witnesses  
11 used or to be used in this case, and in particular, disclosure of any informant who was a percipient  
12 witness in this case or otherwise participated in the crime charged against Mr. Mateo. The government  
13 must disclose the informant's identity and location, as well as the existence of any other percipient  
14 witness unknown or unknowable to the defense. Roviaro v. United States, 353 U.S. 53, 61-62 (1957).  
15 The government must disclose any information derived from informants which exculpates or tends to  
16 exculpate the defendant.

17 (18) Bias by Informants or Cooperating Witnesses. The defendant requests disclosure of  
18 any information indicating bias on the part of any informant or cooperating witness. Giglio v. United  
19 States. Such information would include what, if any, inducements, favors, payments or threats were  
20 made to the witness to secure cooperation with the authorities.

21 (19) Residual Request. Mr. Mateo intends by this discovery motion to invoke his rights  
22 to discovery to the fullest extent possible under the Federal Rules of Criminal Procedure and the  
23 Constitution and laws of the United States. Mr. Mateo requests that the government provide his attorney  
24 with the above requested material sufficiently in advance of trial to avoid unnecessary delay prior to  
25 cross-examination.

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1                                  IV.

2                                  **REQUEST FOR LEAVE TO FILE FURTHER MOTIONS**

3                                  After viewing immigration-related documents, such as the A-file or deportation hearing  
4                                  tapes, counsel for Mr. Mateo will likely find it necessary to file further motions, or to supplement  
5                                  existing motions with additional facts. Counsel may also need to file further depending upon evidence  
6                                  or lack of evidence of Miranda advisal. Therefore, defense counsel requests the opportunity to file  
7                                  further motions based upon information gained from discovery.

8

9                                  V.

10                                 **CONCLUSION**

11                                  For the reasons stated above, Mr. Mateo moves this Court to grant his motions.

12

13                                  Respectfully submitted,

14

15                                  /s/ Amber Baylor

16                                  Dated: January 11, 2008

17                                  **AMBER BAYLOR**  
18                                  Federal Defenders of San Diego, Inc.  
19                                  Attorneys for Mr. Miguel Mateo

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